

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR 24 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE THE ESTATE OF JAMES L. LAKE)	2 CA-CV 2012-0106
_____)	DEPARTMENT A
)	
MACK LAKE III,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
Plaintiff/Appellant,)	Rule 28, Rules of Civil
)	Appellate Procedure
v.)	
)	
THE ESTATE OF JAMES L. LAKE and)	
NANCY BENSON and MARY LAKE,)	
Fiduciary/Personal Representatives for The)	
Estate of James L. Lake)	
)	
Defendants/Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. PB20090637

Honorable Ted B. Borek, Judge

DISMISSED

Mack Lake III

San Tan Valley
In Propria Persona

Law Office of Edward H. Laber
By Edward H. Laber

Tucson
Attorney for Defendants/Appellees

H O W A R D, Chief Judge.

¶1 Appellant Mack Lake III (“Mack”) appeals from the trial court’s judgment for the estate of James L. Lake (“Estate”) on his claims for breach of fiduciary duty, fraud, fraudulent recording, and declaratory relief. Because we lack jurisdiction, we dismiss the appeal.

Factual and Procedural Background

¶2 The record reflects the following procedural background. In September 1996, the decedent James Lake transferred real estate known as the Chapin Lease property from a family trust (“Lake Trust”) to his own personal trust. In November 2009, Mack Lake filed a claim against the Estate, asserting that James Lake had committed what he referred to as a “breach of fiduciary trust” based on the transfer of the Chapin Lease property. In September 2010, Mack filed an amended complaint, asserting additional claims for fraud, constructive trust, fraudulent recording, and declaratory relief. The trial court, in a signed minute entry, found in favor of the Estate on all counts except the claim for declaratory relief based on a constructive trust. On those claims, the court imposed a constructive trust over the Chapin Lease property, based on the decedent’s intent to provide for Mack and his brothers. The court found Mack had an 8.33 percent share of the interest of the Lake Trust beneficiaries in that property. However, the court noted that ownership of the Chapin Lease property was still being litigated in a separate case in Mohave County, and it therefore ordered, “As far as an Order or Judgment is concerned, this case will be held in abeyance until the Mohave County case has been resolved.” Mack then filed a motion for reconsideration or new trial pursuant to Rule 59, Ariz. R. Civ. P., which the court denied. Mack appeals.

Jurisdiction

¶3 Mack does not assert any basis for our jurisdiction over this appeal, as required by Ariz. R. Civ. App. P. 13(a)(3), and the Estate did not raise the issue in its statement of the case. Nonetheless, even when neither party addresses jurisdiction, we have an independent duty to determine whether we have jurisdiction over an appeal. *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465-66, 957 P.2d 1007, 1008-09 (App. 1997) (dismissing appeal for lack of final judgment where parties anticipated further trial court proceedings). Our jurisdiction is set by statute, and we have no authority to hear an appeal over which we have no jurisdiction. *See Hall Family Props., Ltd. v. Gosnell Dev. Corp.*, 185 Ariz. 382, 386, 916 P.2d 1098, 1102 (App. 1995).

¶4 In general, we have jurisdiction only over appeals of final judgments which dispose of all claims and all parties. A.R.S. § 12-2101(A)(1); *Maria v. Najera*, 222 Ariz. 306, ¶ 5, 214 P.3d 394, 395 (App. 2009). When an appeal is taken while any substantive matter is pending in the trial court, “appellate courts should dismiss a case for lack of jurisdiction.” *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, ¶ 38, 132 P.3d 1187, 1195 (2006).

¶5 However, § 12-2101(A)(6) provides that an appeal may be taken from “an interlocutory judgment that determines the rights of the parties and directs an accounting or other proceeding to determine the amount of the recovery.” In *Bilke v. State*, our

supreme court held that for a judgment to be appealable under § 12-2101(A)(6),¹ the court “must use express language that the judgment has finally determined the rights of the parties and is subject to an interlocutory appeal.” 206 Ariz. 462, ¶ 23, 80 P.3d 269, 274 (2003). If the court does not make a discretionary finding that “an appeal should lie in the particular case,” a judgment that has not resolved the issue of recovery is not appealable. *Id.*; *Fields v. Oates*, 230 Ariz. 411, ¶ 15, 286 P.3d 160, 164 (App. 2012) (without express direction “that the only issue remaining is the amount of recovery,” order not appealable under § 12-2101(A)(6)).

¶6 In this case, rather than using language indicating the judgment was final, the trial court specifically stated that it was not entering an “Order or Judgment,” but that “this case will be held in abeyance until the Mohave County case has been resolved” and only then would “this matter . . . proceed to the final accounting.” Nor did the court make an express direction that the case was subject to an interlocutory appeal as required by *Bilke*. Furthermore, the case does not appear to be final as to all issues except recovery. The court’s judgment notes that “should there be an issue with regard to the percentages cited by the court . . . counsel may subsequently submit a request for modification.” This language suggests that the percentage of the Chapin Lease property to which Mack is entitled may still be open to further adjudication and modification. And the court did not include language pursuant to Rule 54(b), Ariz. R. Civ. P., that would

¹At the time *Bilke* was decided, this provision was codified as A.R.S. § 12-2101(G). The statute was renumbered in 2011 without any substantive change to this provision. 2011 Ariz. Sess. Laws, ch. 304, § 1.

render the decision final. *See Bilke*, 206 Ariz. 462, ¶ 23, 80 P.3d at 274 (certification under Rule 54(b) would satisfy finality requirement). Accordingly, the judgment of the trial court is not final, nor is it appealable under § 12-2101(A)(6).

Conclusion

¶7 For the foregoing reasons, we dismiss this appeal for lack of jurisdiction.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Michael Miller
MICHAEL MILLER, Judge